THE HON'BLE SRI JUSTICE BILAL NAZKI

AND

THE HON'BLE SRI JUSTICE G.CHANDRAIAH

WRIT PETITION No. 2399 of 2006

Date: 09-06-2006.

Between :

Japson Estates Pvt. Ltd., Hyderabad, rep. by its Managing Director.

…..Petitioner

And

Dy.Commissioner of Income Tax, Circle –2 (1), Hyderabad & another.

…..Respondents.

For the Petitioner : Dr.N.R.Sivaswamy & Sri S.Dwarakanath
For the Respondents : SRI S.R.ASHOK

< Gist:

> Head Note:

? CITATIONS:

1. 165 ITR 86 (Bom)

2. 239 ITR 421 (P&H)

3 238 ITR 820 (Cal)

4. 245 ITR 457 (Cal)

5. 222 ITR 620 (MP)

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ORDER : (Per Hon'ble Sri Justice Bilal Nazki)

This writ petition has been filed challenging the intimation dated 27.1.2006 issued by 1st respondent under Section 143(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'), adjusting the amount of refund of Rs.32,58,795/- pertaining to the assessment year 2005-06 against the demand of Rs.45,14,870/-.

The facts are not at dispute. For the assessment year 2003-04, the assessee Company returned a total income of Rs.25,63,380/-. However, through an assessment order dated 30.12.2005, the Deputy Commissioner of Income-tax, under Section 143(3) of the Act, determined the total income as Rs.1,21,14,010/-. He determined the

net tax payable by the assessee at Rs.45,14,870/-. The assessment order was served on the assessee on 16.1.2006. A notice of demand was issued under Section 156 of the Act for the assessment year 2003-04. It was served on the assessee on 16.1.2006. According to this notice, the tax was payable by the assessee within thirty days of the date of service. Thus, the demand was required to be made good by the assessee on or before 15th of February 2006. The assessee filed an appeal before the Commissioner of Income-tax within the stipulated period of thirty days and the appeal is pending before the Commissioner of Income-tax (Appeals). For subsequent assessment year i.e. 2005-06, the Company filed a return disclosing taxable income of Rs.11,69,051/-. The tax payable on the returned income was Rs.4,27,785/-. However, the Company paid excess tax i.e. Rs.35,31,400/-. It happened because tax was deducted at source from a portion of income received by the assessee during the relevant accounting year. The Assessing Officer accepted his return for the assessment year 2005-06 under the provisions of Section 143 (1) (ii) of the Act and issued intimation on 27.1.2006, which was served on the petitioner-Company on 30.1.2006. By virtue of this order, the assessee was entitled to a refund of Rs.32,58,795/- including interest of Rs.1,55,180/-. Instead of refunding the money, the Assessing Officer adjusted this amount against the demand of Rs.45,14,870/- pertaining to assessment year 2003-04. The petitioner is aggrieved of this adjustment.

The main contention of the learned counsel for the petitioner is that no prior intimation as required under Section 245 of the Act was given before the amounts were adjusted. It is also contended that the amount found due for the assessment year 2003-04 could be paid on or before 15.2.2006, but the adjustment order was made on 27.1.2006 when, as a matter of fact, the assessee was not obliged to make payments in terms of the notices issued to him for the assessment year 2003-04.

Counter has been filed. There is no dispute raised with regard to the facts. But it is contemplated that in terms of Section 245, before an adjustment is made, it is not necessary to issue a show cause notice and the Department can adjust the amount, and what is required for such adjustment is only intimation in writing to the assessee. It is also contended by the Department that the notice of demand under Section 156 of the Act for the assessment year 2003-04 was served on the assessee on 16.1.2006. He was required to pay the amount within thirty days. That does not mean that the demand could not be enforced by way of adjustment of refund within thirty days, as the amount became due soon after the order of assessment was passed.

To appreciate the rival contentions, it will be necessary to reproduce Section 245 of the Act, which reads as under ;

> "Where under any of the provisions of this Act, a refund is found to be due to any person, the Assessing Officer, Deputy Commissioner (Appeals), Commissioner (Appeals), or Chief Commissioner or Commissioner, as the case may be, may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under this Act by the person to whom the refund is due, after giving an intimation in writing to such person of the action proposed to be taken under this section."

On bare reading of this Section, it becomes clear that the Assessing Officer, Deputy Commissioner (Appeals), Commissioner (Appeals), or Chief Commissioner or Commissioner may, in lieu of payment of the refund, set off the amount to be refunded or any part of that amount, against the sum, if any, remaining payable under the Act by the person to whom the refund is due. The only condition for exercise of such power is that it can be done after giving intimation to such person of the action proposed to be taken under this Section.

In the present case it has been contended in the counter affidavit that intimation was given. But the only intimation we find from the record is the intimation under Section 143(1) of the Act, which is the impugned intimation. Intimation under Section 143(1) of the Act is an intimation

regarding refund. Section 143(1) of the Act lays down;

"143 (1): Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, --

i. if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under section 156 and all the provisions of this Act shall apply accordingly; and

ii. if any refund is due on the basis of such return, it shall be granted to the assessee and an intimation to this effect shall be sent to the assessee :

Provided that except as otherwise provided in this sub-section, the acknowledgement of the return shall be deemed to be an intimation under this sub-section where either no sum is payable by the assessee or no refund is due to him ;

Provided further that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the return is made :

Provided also that where the return made is in respect of

> the income first assessable in the assessment year commencing on the 1st day of April, 1999, such intimation may be sent at any time up to the 31st day of March, 2002."

In this case, at the foot note of the intimation under Section 143(1), it has been inscribed, *"Adjusted against demand (partly) for A.Y.2003-04 at Rs.45,14,870/-."* By no stretch of imagination, this intimation can be treated as intimation under Section 245 of the Act. It has been contended in the counter affidavit that the assessee did not communicate any reason to the Department as to why the adjustment as proposed in the intimation should not be made, but there is no such intimation of any proposed adjustment. It is only a notice under Section 143 (1) of the Act, in which it has been communicated that the amounts have already been adjusted. Therefore, there was no occasion for the assessee-petitioner to raise an objection to the adjustment. It may be true that Section 245 of the Act does not contemplate a show cause notice or an inquiry, but at the same time, it requires a prior intimation in writing, of the proposed action of adjustment. Admittedly, such a notice was not given to the petitioner.

The learned counsel for the petitioner has drawn our attention to various judgments. They are – (1) **A.N.Shaikh v. Suresh B.Jain**, (2) **State Bank of Patiala v. CIT**, (3) **J.K.Industries v. CIT**, (4) **CIT v. J.K.Industries Limited** and (5) **Shivnarain Shivhare v. ACIT**.

Since there has been no intimation in terms of Section 245 of the Act, therefore, the petitioner has been deprived of his right to raise any objections to the order of adjustment. Therefore, the intimation to the extent of adjusting the amount, is quashed.

The second ground urged that the amounts were not due as the petitioner had thirty days time to make payment would not be

necessary for us to decide at this stage. Since the respondents had failed to give intimation in terms of Section 245 of the Act to the petitioner, the part of the communication contained in intimation under Section 143 (1) regarding adjustment, is quashed. However, the respondents are at liberty to issue intimation prior to adjustment in terms of Section 245 of the Act.

With the above directions, the writ petition is allowed.
No order as to costs.

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(BILAL NAZKI, J)

Date: 09-06-2006

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(G. CHANDRAIAH, J)

N.B:

L.R. Copies to be marked.

(B/o)

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